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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 267

ARLIE MITCHELL AND JAMES ROGERS, *Petitioners,*

v.

MALVERN GRAVEL COMPANY, *Respondent.*

PETITIONERS' BRIEF IN REPLY

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The issue raised in the petition for certiorari and joined in respondent's brief in opposition is simply: Is the question of common carrier status under the FELA in all cases and for all purposes a question for the court, or is it under some circumstances a question for the jury? In order that this question might be fairly and accurately presented for this Court's consideration, petitioners will answer, by way of this reply brief, some of the points raised by respondent in its brief in opposition. These points will be considered in the order raised, and not necessarily in the order of importance.

Respondent, in imitation of the majority of the Arkansas Supreme Court, notes at the outset of its brief (RB 3) its reliance upon the *Wells Fargo* case (254 U.S. 175, 187-188). Petitioners thoroughly distinguished this case in their petition (PB 6; 11), demonstrating its tenuous applicability to the instant case. However, even if the *Wells Fargo* definition of a common carrier were to be applied, it is submitted that respondent did meet such definition. Respondent did carry for the public; it was and is a railroad company. It acted as a common carrier. Further, respondent did own or lease "cars, engines, track, roadbed, and other property pertaining to a going railroad." To say that it was not a "going railroad" is to entirely ignore its existence. Granted it was not the Pennsylvania, the Santa Fe or the Missouri Pacific. But it was a "going railroad."

Of course, this whole approach ignores the crucial point in issue here, *i.e.*, did Congress intend that railroad workers on a railroad of this nature should be protected under the FELA? Respondent's attempt to build this Court's forty-five year old statement, made in the course of its finding that an express company maintaining facilities in one car of a train is not a common carrier under the FELA, into dispositive authority for the question presented in this case, ignores the factual distinctions between the two cases and obscures the question here presented.

Respondent next seizes upon petitioners' statement that "the question presented is important to all industrial concerns maintaining railroad facilities," (PB 6; RB 4) and makes it into a plea for deliverance from the ravages of the FELA. Railroads cannot insulate

themselves from liability under the FELA by repairing to the often out-dated shelter of Workmen's Compensation Acts. Again, the question is, did Congress intend railroad workers like petitioners to be covered by the FELA? The question is not, should this Court now fashion protection for a company in respondent's position who has failed to meet its obligations under the FELA.

Respondent attempts to distinguish *Kach* v. *Monesson Southwestern Ry. Co.*, 151 F. 2d 400 (3d Cir. 1945) relied upon by petitioners, by arguing that the railroad there "handled goods of others for hire." (RB 4). This is wrong. Nowhere in the case does it state that the railroad, which was really nothing more than an "in-plant" railroad for the Pittsburgh Steel Company, ever carried anything for anyone other than the steel company. The case supports the proposition for which petitioner cited it, *i.e.*, that a Federal court has recognized that an entirely "in-plant" railroad can be a common carrier under the FELA.

Respondent also attempts to distinguish (RB 6) the case of *Eddings* v. *Collins Pine Co.*, 140 F. Supp. 622. Petitioners relied upon this case to demonstrate that a Federal court has held, in considering the applicability of the FELA to a parent-subsidiary situation, that a company cannot avoid liability under the Act by setting up a separate railroad corporation which is nothing more than the alter ego of the parent non-railroad company. That is what the case held, what it was cited for, and what it supports. Respondent, with respect to the parent-subsidiary question, was in precisely the same posture as the defendant company in *Collins*. Thus petitioners' argument that respondent should be held liable for the acts of the railroad just

as the defendant was held liable in *Collins* was and is well founded.

Respondent states that "there is no proof that the public did demand service of Respondent." (RB 8). This statement is clearly refuted by the evidence of record in this case. Petitioners catalogued in their petition for certiorari numerous instances where the public had demanded and received service from respondent. (PB 13-15). To state that the public never demanded service of respondent in the face of this bald evidence is to ignore completely the record in this case.

Respondent takes issue (RB 8) with petitioners' statement that respondent "could not prove any instance where it *refused* use of its facilities to any individuals or corporations," (PB 18) denying that respondent had any "duty" to prove such. Petitioners had proved that respondent carried for others on a number of occasions (PB 13-15), which of course was its burden. Respondent did not choose to place any witnesses on the stand to demonstrate that they had ever refused service to anyone. Whether they had a "duty" to show this is not the point; what is the point is that, had respondent ever refused such service, it is reasonable to assume that such witnesses would have been produced. Failing to produce such evidence, petitioners submit that respondent must be burdened with all reasonable inferences flowing from the affirmative evidence produced by petitioners which, coupled with respondent's failure to show it had ever refused service, supports and strengthens the inference that respondent was ready and willing to carry for all who requested or demanded service.

Respondent next states: "Despite Petitioners' statement at page 18 of the Petition, there is absolutely no proof in the record that the public had the right to demand service of Respondent as a common carrier." (RB 8). In addition to showing that respondent was a common carrier under the Constitution of Arkansas (PB 18), petitioners clearly demonstrated that respondent had exercised the power of eminent domain (PB 9a). Under Arkansas decisions, the power of eminent domain may only be used for a public purpose, and once it is used, the public has a right to demand service of the one exercising the power. *St. L.I.M. & S. Ry. Co.* v. *F.S. & V.D. Ry. Co.*, 104 Ark. 344, 148 S.W. 531; *Railway Co.* v. *Petty*, 57 Ark. 359. See also *Clear Creek Oil & Gas Co.* v. *Ft. Smith Sp. Co.*, 148 Ark. 260, 230 S.W. 897. Once having exercised the power of eminent domain, respondent was thereafter subject to the demand of the public for use of its facilities. Thus the public not only had the legal "right" to demand service, but also exercised it on numerous (proven) occasions. (PB 13-15).

Respondent cites four Arkansas' cases (RB 8) for the proposition that "the Arkansas Court has consistently held that the determination of the status as a common carrier is a matter of law to be determined by the Court." While it is true that the court did determine in these cases the question of common carrier status without reference to a jury, the reason for its so doing was not because it was determining that this was a question of law for all purposes. In each one of these cases the court carefully and consistently noted that the *evidence was undisputed*—there simply were no disputes with respect to the facts in any of the cases. Further, in none of these cases did the Arkansas Court

state that common carrier status is always a question for the court. If these cases did stand for the proposition for which they were cited, the question arises as to why the Supreme Court of Arkansas did not cite them in its opinion in the instant case. The answer is clear—they do not support such a proposition.

Finally, respondent places great reliance upon the cases of *Duffy* v. *Armco Steel Corp.*, 225 F. Supp. 737; *Tilson* v. *Ford Motor Co.*, 130 F. Supp. 676; and *Kelly* v. *General Electric Co.*, 110 F. Supp. 4, *aff'd*, 204 F. 2d 692, *cert. denied*, 346 U.S. 886, three lower Federal court cases wherein the "in-plant" common carrier status of certain railroads under the FELA was considered. These cases stand for the proposition—uncontested by petitioner—that where there is a wholly "in-plant" railroad, carrying only for itself and no others, and where there are no contested or disputed facts, the question of common carrier status under the FELA is one for the court and not the jury. In *Kelly*, the District Court noted that "it is clear that G. E. moves only its own products." (110 F. Supp. 4, 8). In *Tilson*, the deposition of a Ford executive clearly demonstrates that Ford's railroad facilities were used only to move Ford's products ("Q. Does the Ford Railroad serve anyone else besides the Ford Motor Co.? A. No, sir." 130 F. Supp. 676, 678). Finally, in *Duffy* the Court noted:

> The railroad equipment owned by Armco has not been used to transport goods of others, nor has Armco offered their use to the public. Thus, it appears to a certainty that there is no genuine issue as to any material fact in this case. 225 F. Supp. 737, 738.

Since these companies never carried for anyone but themselves, the courts obviously were not presented

with any factual issues to submit to a jury; the facts were not disputed and under a familiar principle of law, the court would decide the issue.

But these cases do not meet the question raised by this petition, *i.e.*, whether, where an essentially "in-plant" railroad carries for others, and where there are disputed questions of fact, the question of common carrier status under the FELA is one for the jury or the court. In the cases cited the companies carried their own goods and their own goods only. Here, respondent was shown to have carried goods for others and for remuneration. Here there were material disputes as to many facts. For example, did the long-term agreement between Malvern and the batch plant located further down its track include payment to Malvern for transporting the batch materials on Malvern's railroad? Did the $5.00 per car from the Rock Island to Malvern Gravel Company constitute payment to it for moving the railroad cars? Could the public demand service of respondent in the future? Could respondent legally refuse to give such service? Did respondent ever in fact refuse service to anyone? These are only some of the factual issues the determination of which decides common carrier status. These are questions concerning which there were disputes—disputes properly resolved by the jury. Different minds could draw different conclusions from the facts in issue; these inferences were for the jury, and not for the Supreme Court of Arkansas.

Passing upon the credibility of witnesses is also a well-recognized function of the jury. This is an especially important function where one of the witnesses is an interested party. There was controversy concerning the frequency of use of respondent's facili-

ties, as evidenced by the testimony of respondent's president (who owned a substantial portion of the company), and the testimony of one of petitioners' witnesses.[1] There was also dispute over the future use of lands acquired along the right of way and whether respondent would be subject to a demand by future industries along this way for railroad services over respondent's railroad. (R. 79). The trial judge considered the possibility that others in the future might have need for service from the railroad as one of the factual issues which could only be resolved by the jury.[2] Respondent's president gave confused testimony concerning the make-up of the Board of Directors of the gravel company and the railroad, a fac-

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[1] *Compare* the statement of respondent's president concerning the hauling it did for others that, "well, once in a while some farmers get in a car of lime or something like that and we have some bridge steel that came in, and they unloaded it out there," (Tr., Vol. II, p. 244), *with* the testimony of the general clerk for the Missouri Pacific at Malvern who testified concerning the numerous shipments handled by respondent. (R. 95-96).

[2] "Finding of fact: After careful consideration of the argument of counsel and supporting briefs, and after examination of citations supplied the Court, the Court remains of the opinion that the question of whether or not Malvern Gravel Company is a common carrier by rail is a factual matter to be determined by a jury. There is evidence from which the jury could infer that the general public had a right to demand use of the railroad lines, and the Court distinguishes this case from *Kelly* v. *General Electric*, 110 F. Supp. 4, for in the *Kelly* case all trackage was located on the plant site itself and in the instant case the track extends across lands of others for more than a mile from the Malvern Gravel Company plant, and under the evidence other individuals and companies have had use of the track, from which the jury could infer that the other land owners along the track might erect some industry that could demand and be entitled to use of the track. Motion for verdict non obstante verdicto denied." (Tr., Vol. II, p. 158).

tor bearing upon another important issue in this case. (R. 67). There was also controversy with reference to the relation of respondent's railroad with another factory located further down its line at some disputed time prior to the accident, and what effect its relations with such factory had on its common carrier status. (R. 67; 95). In addition to being disputed issues, these were all questions bearing upon respondent's president's credibility, questions which should have been left with the jury, and not the Supreme Court of Arkansas.

In the final analysis, this case comes to this: Congress passed the FELA in order to protect railroad workers from the dangers inherent in this manifestly and historically dangerous work. In passing the Act, Congress did not define the term "common carrier." We know from the legislative history of the Act that Congress "intended its scope to cover all commerce to which the regulative power of Congress extends." H.R. Rep. No. 1386, To Accompany H.R. 20310, 60th Cong., 1st Sess. (1908). Thus Congress evidenced an intention to protect all railroad workers who were subject to the dangers inherent in railroad work. Petitioners are just such railroad workers subject to just such dangers as prompted Congress to pass the FELA. Witness the horrible injuries they have suffered. Should they not be protected under the Act? This Court has noted the "pre-eminent role" of the jury in these FELA cases. *Ferguson* v. *Moore-McCormack Lines,* 352 U.S. 521, 523. Whether, given the disputed factual circumstances noted, the determination of respondent's common carrier status is properly one for a jury or for a court is an important question under the Act and one which should be passed upon by this Court.

CONCLUSION

Wherefore, the petitioners pray that a writ of certiorari be granted.

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